

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-82653; File No. SR-Phlx-2018-13)

February 7, 2018

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Pricing Schedule to Exclude NDX and NDXP Options from the Strategy Caps and from Special Pricing for FLEX Transactions

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹, and Rule 19b-4 thereunder,² notice is hereby given that on January 26, 2018, Nasdaq PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's Pricing Schedule to exclude A.M. and P.M.-settled options on broad-based indexes with nonstandard expiration dates from its pricing for Strategy Caps and for FLEX transactions.

While changes to the Pricing Schedule pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on February 1, 2018.

The text of the proposed rule change is available on the Exchange's Website at <http://nasdaqphlx.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange lists A.M and P.M.-settled options on the Nasdaq 100[®] Index with nonstandard expiration dates under the symbols “NDX” and “NDXP,”³ respectively. NDX and NDXP are proprietary products that are or soon will be traded exclusively on the Exchange and its affiliates.⁴ The pricing schemes applicable to these products reflects their proprietary and exclusive nature.⁵ That is, transactions in NDX and NDXP are exempt from many of the fee caps, fee waivers, and prices that otherwise apply to other options transactions. For example, transactions in options overlying NDX and NDXP are excluded from the “Monthly Market Maker Cap” and the “Monthly Firm Fee Cap.” Furthermore, for members executing facilitation

³ The Exchange lists NDXP on a pilot basis. See Securities and Exchange Act Release No. 82341 (December 15, 2017), 82 FR 60651 (December 21, 2017) (SR-Phlx-2017-79).

⁴ NDX is listed on Phlx, Nasdaq ISE, and Nasdaq GEMX. Several NDX options are listed on Cboe, but once they expire later this year, NDX will be entirely exclusive to the Nasdaq, Inc. Exchanges. NDXP presently is listed only on Phlx, but other Nasdaq-owned self-regulatory organizations intend to list it at a later date.

⁵ See Securities and Exchange Act Release No. 82341 (December 15, 2017), 82 FR 60651 (December 21, 2017) (SR-Phlx-2017-79).

orders, NDX and NDXP options transactions are excluded from waivers of the Firm Floor Options Transaction and the Broker-Dealer Floor Options Transaction charges.

Presently, however, one category of fee cap remains applicable to transactions in NDX and NDXP. Pursuant to Section II of the Pricing Schedule, transactions in NDX and NDXP are subject to so-called “Strategy Caps.” Strategy Caps limit the fees that otherwise apply to certain categories of options participants when they engage in Floor options transactions while employing strategies set forth in the Pricing Schedule, namely dividend, merger, short stock interest, reversal and conversion, jelly roll, or box spread strategies.

Additionally, pursuant to Section IV.B. of the Pricing Schedule, special pricing applies to transactions by Customers and Non-Customers in NDX and NDXP FLEX options.⁶ Customers presently pay no fees for such transactions, while Non-Customers pay \$0.25 per contract. Moreover, the Monthly Firm Fee Cap, Monthly Market Maker Cap, Strategy Caps and the Options Surcharge described in Section II of the Pricing Schedule apply to FLEX Transaction Fees for NDX and NDXP.

The Exchange proposes to amend these two provisions of the Pricing Schedule. First, the Exchange proposes to amend Section II to exempt transactions in NDX and NDXP from Strategy Caps. Second, the Exchange proposes to apply Section II pricing to transactions in NDX and NDXP FLEX options. Accordingly, electronic and floor options transaction charges for FLEX options overlying NDX and NDXP will be \$0.75 per contract for all Non-Customers. No transaction charge will apply to Customers for NDX or NDXP FLEX options. A \$0.25 per contract surcharge will be assessed to Non-Customers in NDX and NDXP FLEX options.

⁶ The characteristics of a FLEX option are discussed in Rule 1079.

The purpose of these two amendments to the Pricing Schedule is to further refine the pricing of transactions in NDX and NDXP to reflect the exclusive and proprietary nature of these products.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁷ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁸ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”⁹

Likewise, in NetCoalition v. Securities and Exchange Commission¹⁰ (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(4) and (5).

⁹ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

¹⁰ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

approach.¹¹ As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”¹²

Further, “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”¹³ Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange’s proposal to exclude NDX and NDXP options transactions from the Strategy Caps in Section II of the Pricing Schedule is reasonable because these caps apply to Multiply-Listed Options and NDX and NDXP are not Multiply-Listed Options. As noted above, NDX and NDXP are listed exclusively on the Exchange. The Exchange does not believe that such caps are necessary to incentivize member organizations to execute strategies on the Floor involving products like NDX or NDXP that are exclusive to it. The Exchange’s proposal to exclude NDX and NDXP options transactions from Strategy Caps is also equitable and not unfairly discriminatory because the Exchange will apply this cap exclusion in a uniform manner.

The Exchange’s proposal to exclude NDX and NDXP FLEX options from Section IV.B.

¹¹ See NetCoalition, at 534 - 535.

¹² Id. at 537.

¹³ Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

– FLEX Transaction Fees pricing and instead apply to such transactions Section II pricing is reasonable because the Exchange believes that FLEX option pricing will continue to be competitive despite the exclusion of NDX and NDXP. The Exchange’s proposal is equitable and not unfairly discriminatory because the Exchange will uniformly exclude NDX and NDXP FLEX options from FLEX option pricing. Moreover, the Exchange will apply to participants in NDX and NDXP FLEX options the same Section II transaction charges it applies to participants in other types of NDX and NDXP options transactions.

The Exchange notes that the proposed transaction charges for NDX and NDXP FLEX options are reasonable, equitable and not unfairly discriminatory as NDX and NDXP are exclusively listed products. The Exchange seeks to recoup its operational costs¹⁴ for listing proprietary products. Also, pricing by symbol is a common practice on many U.S. options exchanges as a means to incentivize order flow to be sent to an exchange for execution in particular products. Other options exchanges price by symbol.¹⁵ Further, the Exchange notes that with its products, market participants are offered an opportunity to either transact NDX or NDXP or separately execute options overlying PowerShares QQQ Trust (“QQQ”).¹⁶ Offering products such as QQQ provides market participants with a variety of choices in selecting the product they desire to utilize to transact the Nasdaq 100[®] Index.¹⁷ When exchanges are able to

¹⁴ By way of example, in analyzing an obvious error, the Exchange would have additional data points available in establishing a theoretical price for a Multiply Listed Option as compared to a proprietary product, which requires additional analysis and administrative time to comply with Exchange rules to resolve an obvious error.

¹⁵ See pricing for RUT on CBOE’s Fees Schedule.

¹⁶ QQQ is an exchange-traded fund based on the Nasdaq-100 Index[®].

¹⁷ QQQ options overlies the same Index as NDX and NDXP, namely the Nasdaq 100[®] Index. This relationship between QQQ options and NDX and NDXP options is similar to the relationship between RUT, the iShares Russell 2000 Index, and IWM which is the ETF on RUT.

recoup costs associated with offering proprietary products, it incentivizes growth and competition for the innovation of additional products.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. The Exchange notes that with its products, market participants are offered an opportunity to either transact NDX or NDXP or separately execute options overlying PowerShares QQQ Trust ("QQQ"). Offering products such as QQQ provides market participants with a variety of choices in selecting the product they desire to utilize to transact the Nasdaq 100 Index.¹⁸

The Exchange's proposal to exclude NDX and NDXP from the Strategies Caps does not impose an undue burden on competition because no market participant would be eligible to count NDX or NDXP toward the Strategies Caps.

The Exchange's proposal to exclude NDX and NDXP from FLEX Option pricing in Section IV.B. and instead apply Section II pricing to such transactions does not impose an undue burden on competition because the proposal would apply to participants in FLEX NDX and NDXP options transactions the same transactions fees that it assess for other types of NDX and NDXP options transactions.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

¹⁸ See note 17 above.

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.¹⁹

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-Phlx-2018-13 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

¹⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

All submissions should refer to File Number SR-Phlx-2018-13. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to

make available publicly. All submissions should refer to File Number SR-Phlx-2018-13, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

Eduardo A. Aleman
Assistant Secretary

²⁰ 17 CFR 200.30-3(a)(12).